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Supreme Court, U.S.
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No. (1)

In the
Supreme Court of the United States

Yong Zhu,
Petitioner

v.

Massachusetts Institute of Technology,
Respondent

On Petition for a Writ of Certiorari to the
Massachusetts Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

Yong Zhu
Pro Se
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April 28, 2008

QUESTION REPRESENTED

1. Is the rule applied by Middlesex Superior Court in Massachusetts supported by federal laws or regulations?

2. Should Federal Regulation 14CFR1260 be ignored by a party of Federal Demonstration Partnership in administration of NASA [1] research grants?

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[1] NASA represents the National Aeronautics and Space Administration.

TABLE OF CONTENTS

page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF APPENDIXES iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 12

I. THE "RULE" USED IN THE DICISION BELOW IS NOT SUPPORTED BY FEDERAL LAW 12

II. FEDERAL REGULATION 14CFR1260 CANNOT BE IGNORED BY A PARTY OF FEDERAL DEMONSTRATION PARTNERSHIP 14

III. THIS QUESTION IS AN IMPORTANT ISSUE OF FEDERAL LAW 17

CONCLUSION 18

TABLE OF APPENDIXES

APPENDIX I: MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT 19

APPENDIX II: SUMMARY JUDGMENT M.R.C.P.56 ...35

APPENDIX III: MEMORANDUM AND ORDER PURSUANT TO RULE 1:28 36

APPENDIX IV: NOTICE OF DENIAL OF F.A.R. PPLICATION 37

APPENDIX V: NOTICE OF DOCKET ENTRY 38

APPENDIX VI: FEDERAL DEMONSTRATION PROJECT GENERAL TERMS AND CONDITIONS, PHASE III (1996), ARTICLE 1 39

APPENDIX VII: COVER PAGE OF NASA RESEARCH GRANT NAG-1-2173 42

TABLE OF AUTHORITIES

page

STATUTES AND REGULATION

THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 1 ..... 4, 14

28U.S.C.§1257 1

14CFR1260.13(a)(2)(ii) 2, 11, 13

14CFR1260.26(b) 2, 8, 12

14CFR1260.52 13

14CFR1260.125 (c) 2, 6, 10, 16

OTHER AUTHORITIES

CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, ARTICLE XXX 4, 14

FEDERAL DEMONSTRATION PROJECT (FDP) GENERAL TERMS AND CONDITIONS, PHASE III (1996), ARTICLE 1 .....3, 8, 9, 14-17, 39

NASA SPECIFIC REQUIREMENT FOR NASA GRANTS OR COOPERATIVE AGREEMENTS ...4, 15

OPINIONS BELOW

The Middlesex Superior Court in Massachusetts entered two orders and a summery judgment for the case Yong Zhu vs. Massachusetts Institute of Technology (MIT). One order titled "Memorandum of Decision and Order on the Defendant's Motion for Summery Judgment" and the summery judgment are reproduced in Appendix I (pp19) and Appendix II (pp35) respectively. The opinion of Massachusetts Appeals Court on the appeal of Yong Zhu is displayed in Appendix III (pp36). Appendix IV (pp37) shows the denial of Zhu's Application for Further Appellate Review entered by Massachusetts Supreme Judicial Court. Zhu's petition for reconsideration was again denied by Massachusetts Supreme Judicial Court. (App.V, pp38).

JURISDICTION

The decision of Middlesex Superior Court in Massachusetts was issued on March 31, 2006 (App.I & App.II, pp19-35). The decision of Massachusetts Appeals Court on Zhu's timely appeal was entered on September 25 2007 (App.III, pp36). Zhu's timely application for Further Appellate Review was denied on November 29 2007 (App.IV, pp37). Zhu's petition for reconsideration was denied on January 31 2008 (App.V, pp38). This Court has the jurisdiction to review the case pursuant to 28U.S.C.§1257.

STATUTORY PROVISIONS INVOLVED

14CFR1260 or "THE GRANT AND COOPERATIVE AGREEMENT HANDBOOK":

14CFR1260.125 (c):

"(c) For nonconstruction awards, recipients shall requests prior approvals from NASA for the following program or budget related reasons, except the item in paragraph (c)(5) of this section, which is waived by NASA.

(1) Changes in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) ....."

14CFR1260.26(b):

"Unless otherwise directed by the Grant Officer, an unexpended balance of funds which remains at the end of any funding period, except the final funding period of the grant, shall be carried over to the next funding period, and may be used to defray costs of any funding period of the grant. This includes allowing the carry over of funds to the second and subsequent years of a multiple year grant."

14CFR1260.13(a)(2)(ii):

"Periods approved under the Multiple Year Grant or Cooperative Agreement special condition at §1260.52, and funded at the level specified in the special condition, are not considered to be new

awards. Therefore, new proposals, new proposal-related certifications (such as Disclosure of Lobbying Activities, and Debarment and Suspension), new technical evaluations, and new budget proposals are not required, as long as this information for the multiple year period was reviewed and approved as part of the original proposal."

FEDERAL DEMONSTRATION PROJECT (FDP) GENERAL TERMS AND CONDITIONS, PHASE III (1996), ARTICLE 1 (App.VI, pp39):

"1. Recipient Responsibilities and Federal Requirements

a. The recipient institution (recipient) has full responsibility for the conduct of the project or activity supported by this award, in accordance with the requirements of this award, and for the results. The requirements of this award are contained in:

(1) The Federal statute that authorized this award;

(2) These general terms and conditions;

(3) The supplemental agency-specific requirements of the awarding agency that are incorporated in the Demonstration Agreement (hereafter referred to as agency-specific requirements); and

(4) Any special conditions attached to this award.

b. If the requirements of this award conflict, the following order of precedence shall apply:

(1) The Federal statute that authorized this award;

(2) Any special conditions attached to this

award;

(3) The agency-specific requirements; and

(4) These general terms and conditions."

NASA SPECIFIC REQUIREMENT FOR NASA GRANTS OR COOPERATIVE AGREEMENTS (e.g. App.VII, pp42):

"This Grant (or Cooperative Agreement) is awarded under the authority of 42 U.S.C. 2473(c)(5), and is subject to all applicable laws and regulations of the United States in effect on the date of this Grant (or Cooperative Agreement) is awarded, including but not limited to 14 CFR part 1260 (Grants and Cooperative Agreements)."

THE CONSTITUTION OF THE UNITED STATES:
Article. I. - The Legislative Branch
Section 1 - The Legislature

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS:

"Article XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

STATEMENT OF THE CASE

Petitioner, Yong Zhu came from the Mainland of China, worked for federal research projects at Massachusetts Institute of Technology (MIT) from March 1992. He was laid off in October 2001 from the position of research scientist. On December 22, 2003, Zhu filed a Complaint against MIT (respondent) for discrimination based on national origin and wrongful termination at the Middlesex Superior Court in Massachusetts.

In the process of discovery, Zhu received the documents from MIT, which include the financial budgets and accounts of several research projects awarded by National Aeronautics and Space Administration (NASA) and National Science Foundation (NSF) to MIT. Zhu found from the documents that he was named as a key person in these project budgets, while more than 40 months of the salaries allotted to him in the projects were not paid to him. Based on the facts discovered, Zhu detailed, in the Opposition to the Motion of Summary Judgment of MIT submitted in October 2005, several genuine issues of the discrimination made by MIT. Here, only the issue related to the current questions is discussed.

According to his witnesses on the project budgets and accounts obtained from MIT, Yong Zhu alleged in a great detail with the budgets and account as his exhibits that, from the middle of 1997 MIT used the salaries allotted to him in several research projects to hire three additional researchers who, including two

less qualified new postdoctoral staff from European countries, were not included in the project budgets that time. As the result, the salaries more than 40 months allotted to Zhu in these projects were paid by MIT for the additional people. Zhu alleged also that the exchange of key person in these projects violated Federal Regulation 14CFR1260.1259(c) (pp2), since MIT never provided the prior approvals from NASA for the exchange of key persons.

Zhu alleged again: When the research funds were overrun by hiring extra people, MIT did not terminate the unlawful hiring but sent at least four letters to NASA asking for advance of fund from multiple year NASA Grant NAG-1-2173 in 1999. The fund advanced from NASA was paid to the additional persons continuously until the grant was spent out in July 2000, 19 months before the closing date of this project. As the salary allotted to Zhu was paid to others, MIT laid off him in October 2001 in the excuse of "decline in research funding". This excuse was changed to "lack of funding" in the court decision.

Three NASA grant were not expired at Zhu's layoff. More than 20 months of the salaries allotted to Zhu in the three unexpired grants were not paid to him. The documents submitted by MIT show that MIT hired Valerie Thouret from May 1998 to July 2000 and hired Matthew Evans from May 1999 to April 2000. The documents show also that the two persons were not named in the budgets of the project, from which they got paid.

The respondent never denied or dispute these facts alleged. It only moved to strike the allegations

together with all the project budgets and accounts attached, for the reason that Zhu was not involved in the grants administration at MIT. While, it could not deny that the allegations could also be made by a witness of the financial data, even if he or her was not involved in the grants administration work.

In the decision below, Zhu's allegations on replacement of him with those less qualified and not named in the NASA projects was reworded to be: "Zhu further alleges that Newell mis-spent NASA funds intentionally on non-Chinese scientist to refrain from using the funds to pay Zhu or other Chinese scientists." (App.1, pp27, §1) Since the Supreme Court does not consider the factual errors, let us focus on the two questions presented.

The legal basis of the decision below on the allegations discussed is:

> "The rule regarding NASA funding was such that funds were not given directly to any individual, and also could not be stockpiled." (App.I, pp23, §2)

This rule is then used to draw the following decision:

> "It is absolutely uncontroverted that Newell could not 'stockpile' research funds and carry them over from one year to the next. Therefore, the fact that Newell paid non-Chinese scientist with research funds in 1999 and 2000 is unrelated to the lack of funding with which to pay Zhu 2001." (App.I, pp33, §3)

This decision raised the first question presented in the Petition: Is the rule applied by the state court supported by federal laws or regulations? Yong Zhu appealed timely on October 12 2006 to Massachusetts Appeals Court for the tens of false statements on the facts, allegations and testimonies, as well as the abuse of laws in striking his affidavits and exhibits found in the decisions below. As to the current questions, Zhu reasoned in his Brief that the carry-over of a multiple year grant was allowed by 14CFR1260.26(b) (pp2), and all the NASA grants paid to Evans and Thouret were multiple year grants, two of which did not expire at the time of his layoff.

The respondent did not provide any federal law or regulation to support the rule used in the decision. It only argued in its Brief:

> "MIT established that the CFR provision and the OMB Circular did not apply to Professor Newell's grants because MIT was a party to the Federal Demonstration Project (the "FDP"), whose rules supplant the authorities on which Mr. Zhu relies and do not require NASA's approval to remove or replace a 'key person' on any grant" (MIT' Brief, pp38)

In Footnote 13 (MIT' Brief, pp39), the respondent explained:

> "[t]he FDP's General Terms and Conditions, states that 'codified Federal Regulations, OMB Circulars, such as A-21 and A-110, and other

uncodified Federal policy or procedural requirements apply to this award only as specified in these general terms and conditions, the agency specific requirement, or a special condition of the award.'"

When leaving the first question unanswered, the respondent raised the second question present in the Petition: Should Federal Regulation 14CFR1260 be ignored by a party of Federal Demonstration Partnership in administration of NASA research grants? Zhu argued in his Reply Brief (Zhu's Reply Brief, pp13):

"It is wrong for the defendant to say that 14CFR1260 did not apply to Newell's grants because MIT was a party to the Federal Demonstration Partnership (FDP) (Br. MIT/38). The application of 14CFR1260 for NASA grants is specified by the General Terms and Conditions of FDP (referred to the FDP Terms) in ¶1(a)- ¶1(c) (pp24 or A(I)/129). It is said clearly in ¶1(c): "The requirements of this award identified in subparagraph a of this Article are the entire body of requirements of this award". The FDP Terms is only one of the four requirements specified in ¶1(a). Furthermore, the FDP Terms states in ¶1(b) that if the requirements of this award conflict, all the other three requirements including Federal Statute are over the FDP Terms. The Federal statute requires the application of 14CFR1260 for the NASA grants as stated in my Brief (5). Since

the Federal statute, and so 14CFR1260, are over the FDP Terms if in conflicts, the prior written approval for changing key person required by 14CFR1260.125 was not waived."

The appeal of Zhu was dismissed for the reason (App.III, pp36):

"Although Zhu challenges these rulings on appeal, we conclude that there is nothing in his brief or his oral argument before us that warrants any discussion beyond stating that for the reasons set out in the judge's memoranda, we see no error in either of the judge's rulings."

In the "Memorandum in Support of Application for Further Appellate Review" submitted timely to the Supreme Judicial Court of Massachusetts, Yong Zhu illustrated again:

"The defendant did not provide any regulations or laws to confirm that the carryover of NASA multiple year grant to the next year was not allowed. In the Oral Argument held in the Appeals Court on June 7 2007, the defendant admitted that there were no such federal laws or regulations."

Zhu also asked the question: "Where are the Federal laws or regulations that do not allow the carryover of multiple year NASA grant to the next year?" Again, the respondent could not answer this question in its

"Defendant-Appellee's Opposition to Application for Further Appellate Review", and did not deny the fact that it had admitted no such federal laws or regulations. It only argued:

> "It was uncontroverted that Newell was required to report to NASA if he had not spent all the funds NADA had allocated for a particular year, with the usual consequence that the funding for the next year would be reduced by the amount."

The respondent did not provide any source of the laws or regulations "that the funding for the next year would be reduced by the amount." It was already stated by Zhu (Zhu's Reply Brief, pp12):

> "Moreover, the defendant could not provide any law or regulation to support its false statement: 'The next incremental funding will be reduced by any funds remaining in the account balance' (Br. MIT/33) in a multiple year grant. Federal Regulation 14CFR1260.13(a)(2)(ii) (pp23) states clearly that NASA does not ask for a new budget each period in a multiple year grant since the periods approved are not considered as new awards."

Zhu's Application for Further Appellate Review was denied by Massachusetts Supreme Judicial Court on November 29 2007 (App.IV, pp37). Zhu's petition for reconsideration was also denied on January 31 2008 (App.V, pp38).

REASONS FOR GRANTING THE PETITION

I. THE "RULE" USED IN THE DICISION BELOW IS NOT SUPPORTED BY FEDERAL LAW

The rule used and the decision produced by the state court are:

> "The rule regarding NASA funding was such that funds were not given directly to any individual, and also could not be stockpiled." (App.I, pp23)
>
> "It is absolutely uncontroverted that Newell could not 'stockpile' research funds and carry them over from one year to the next. Therefore, the fact that Newell paid non-Chinese scientist with research funds in 1999 and 2000 is unrelated to the lack of funding with which to pay Zhu 2001." (App.I, pp33)

The NASA grants, which were used by MIT to pay for the additional persons, are multiple year grants. For example, the documents submitted by the respondent to the Superior Court include the cover page of NASA Grant NAG-1-2173, which shows that the grant is a multiple year grant covering the period from March 1 1999 to February 28 2002 (Items 3 and 4 in the cover page, App.VII, pp42). The box of "multiple year" below Item 14 is also checked. Federal Regulation 14CFR1260.26(b) (pp2) states:

> "Unless otherwise directed by the Grant Officer, an unexpended balance of funds which remains at the end of any funding period, except the final

funding period of the grant, shall be carried over to the next funding period, and may be used to defray costs of any funding period of the grant. This includes allowing the carry over of funds to the second and subsequent years of a multiple year grant."

So, the rule used in the decision below conflicts with this regulation. Moreover, the four MIT letters asking for advance of grant in the amount of $186,132.20, dated on August 23, September 3, October 4 and November 3 respectively in 1999, showed that the group had run out the fund ahead of schedule, and so had no funds subject to stockpile that time. The respondent could not deny this fact at the courts below.

The respondent's argument "the funding for the next year would be reduced by the amount" is also false according to 14CFR1260.13(a)(2)(ii) (pp2), which reads:

"Periods approved under the Multiple Year Grant or Cooperative Agreement special condition at §1260.52, and funded at the level specified in the special condition, are not considered to be new awards. Therefore, new proposals, new proposal-related certifications (such as Disclosure of Lobbying Activities, and Debarment and Suspension), new technical evaluations, and new budget proposals are not required, as long as this information for the multiple year period was reviewed and approved as part of the original

propcsal."

The respondent claimed that 14CFR1260 could not be applied to the NASA grants, since MIT was a party to the Federal Demonstration Partnership (FDP). While, the respondent could not prove that the rule used in the decision below was supported by the General Terms and Conditions of FDP or any other federal laws. Whether the NASA grants were subject to 14CFR1260 or not, use of the rule created by judge himself in court is unconstitutional for the violation of Section 1, Article I in the Constitution of the United States (pp4), and violation of Article XXX in the Constitution of the Commonwealth of Massachusetts (pp4).

II. FEDERAL REGULATION 14CFR1260 CANNOT BE IGNORED BY A PARTY OF FEDERAL DEMONSTRATION PARTNERSHIP

MIT argued that the prior written approval for changing key person in the NASA project was waived for the member of Federal Demonstration Partnership (FDP). But, Article 1 of the General Terms and Conditions of FDP (App.VI, pp39) state:

> "a. The recipient institution (recipient) has full responsibility for the condition of the project or activity supported by this award, in accordance with the requirements of this award, and for the results. The requirements of this award are contained in:
>
> (1) The Federal Statute that authorized this

award;

(2) The general terms and conditions;

(3) The supplemental agency-specific requirements of the awarding agency that are incorporated in the Demonstration Agreement (hereafter referred to as agency-specific requirements); and

(4) Any special conditions attached to this award.

b. If the requirements of this award conflict, the following order of precedence shall apply:

(1) The Federal Statute that authorized this award;

(2) Any special conditions attached to this award.

(3) The agency-specific requirements; and

(4) These general terms and conditions."

A FDP award requires not only the General Terms and Conditions of FDP, but also the Federal Statute, agency-specific requirements and the special conditions attached to the award. The Federal Statute, agency-specific requirements and the special conditions are all above the General Terms and Conditions of FDP if in conflict. All the NASA Research Grants or Cooperative Agreements in which Zhu was named as a key person claimed particularly in Item 14 (e.g. App.VII, some in Item 13) the specific requirement:

"This Grant is awarded under the authority of 42 U.S.C. 2473(c)(5) and is subject to all applicable

laws and regulations of the United States in effect on the date this Grant is awarded, including but not limited to 14 CFR part 1260 (Grant and Cooperative Agreements)."

Since the specific requirements is above the General Terms and Conditions of FDP, the NASA grants were nevertheless subject to 14CFR1260, and so the prior written approval for changing key person required by 14CFR1260.125(c) was not waived for these NASA grants. In the quotation cited by the respondent itself (MIT' Brief, pp39):

"..... the FDP's General Terms and Conditions, states that 'codified Federal Regulations, OMB Circulars, such as A-21 and A-110, and other uncodified Federal policy or procedural requirements apply to this award only as specified in these general terms and conditions, the agency specific requirement, or a special condition of the award.'"

the application of codified Federal Regulation 14CFR1260 for NASA grants as required by agency specific requirement is also made clear. To ignore Federal Regulation 14CFR1260 in the court decision below conflicts with the agency specific requirement and FDP General Terms and Conditions.

The respondent claimed in its Brief (pp38) that Zhu did not submit anything to the Superior Court to suggest the application of 14CFR1260 for the NASA grants received by FDP member. Zhu explained:

"MIT provided the fact that it joined FDP in 1996 in 'REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT' (A(I)/103) after I filed the Opposition to MIT's Motion for Summary Judgment. Mr. Fitzgerald made his affidavit earlier too (A(III)/322). But, he saved this fact until the last minute to make me no chance for response in the lower court when the summery judgment was allowed."

As a matter of fact, the full version of General Terms and Conditions of FDP and the grant cover page with the specific requirement of conforming to 14CFR1260 (e.g. App.VII, pp42) are all submitted by the respondent to the Superior Court at the last minute. Zhu did not add any new fact but only corrected the respondent according to the rules and facts submitted and accepted already.

III. THESE QUESTIONS RAISE AN IMPORTANT ISSUE OF FEDERAL LAW

The questions presented in this Petition present an important issue related to federal laws and FDP General Terms and Conditions, which should be settled by the Supreme Court. Today, millions scientists are working for the research projects of federal agencies, and almost all the academic institutes and federal agencies that may issue a research grant are involved in FDP. To ensure the quality of research work, the backgrounds and qualifications of key persons named in the project budget must be inspected carefully by more than one

technical officers in federal agencies (e.g. NASA, 14CFR1260). Thus, the biographic information of Zhu, such as the *Curriculum Vitae* and publication list, were attached to the grant application, when he was named in the budget. If a key person was replaced without notifying the sponsor, the sponsor would have no chance to inspect the academic background of the new person.

In the current case, the two persons, who replaced Zhu in several NASA projects, were the first-year new Ph.Ds and did not have the work experiences on NASA projects before. They both had no the backgrounds required by the projects for providing meteorological services. No any document offered by the respondent showed that NASA checked their academic backgrounds when they replaced Zhu. Since they were unsuitable for the projects, all the proposals for research grants based on their work were rejected afterwards. Therefore, it was required specially by NASA for the institute to comply with 14CFR1260, although it had joined FDP that time.

CONCLUSION

To find whether or not the rule used for the decision below is supported by any federal law, and whether or not the NASA grants discussed are subject to 14CFR1260, the petition for a writ of certiorari should be granted in order to settle down the important issue by the Supreme Court.

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, *ss.* SUPERIOR COURT
CIVIL ACTION
NO. 2004-0027-B

YONG ZHU

vs.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This action arises out of a claim of employment discrimination made by the plaintiff, Yong Zhu ("Zhu") against the defendant, the Massachusetts Institute of Technology ("MIT"). Zhu claims that MIT discriminated against him because of his national origin specifically because Zhu is Chinese, in the course of his employment and wrongfully terminated him. The matter is currently before the Court on the defendant MIT's Motion for Summary Judgment. For the following reasons, MIT's Motion for Summary Judgment is ALLOWED.

BACKGROUND

The following facts are those which are relevant and either undisputed or taken in the light most

favorable to the plaintiff. Zhu is a Chinese-born individual who studied meteorological and atmospheric sciences for many years at universities in China and Great Britain. He worked on a Ph.D. in meteorology at the University of Edinburgh for five years, but did not complete the program and was not awarded the degree. Zhu began working as a Technical Assistant at MIT in March 1992. He worked as a visiting scientist in October 1992, then was hired as a research scientist by Professor Reginald Newell ("Newell"), in December 1995. Newell was a Ph.D. faculty member of MIT'S Department of Earth, Atmospheric and Planetary Sciences ("EAPS") who had been working at MIT since 1962. Zhu worked for Newell on projects that were funded largely by grants from the National Science Foundation ("NSF") and the National Aeronautics and Space Administration ("NASA"). Newell additionally helped Zhu obtain visas to remain in the United States, and loaned Zhu money from Newell's personal funds when Zhu was working unpaid by MIT awaiting his visa.

At the time Zhu was hired as a research assistant, his employment was contingent upon funding from. these sources. Zhu was in some instances named in applications for NSF and NASA grants as one of the individuals who would be working on the project for which the funds were being requested; however, the grants were always given to the institution generally and never to individuals, including Zhu. Zhu produced a large number of data memoranda for Newell's projects, wrote numerous

articles, and published two books in his field during his tenure at MIT.

Between 1992 and his death in 2002, Newell had several other students and assistants working with him on his projects, including Zhong-Xiang Wu, a Chinese-born graduate student; Wenjie Hu, a Chinese-born graduate student; John Cho ("Cho"), a Japanese-born graduate student; Zhenzhong Jing, a Chinese-born graduate student; Yuanlong Hu, a Chinese-born graduate student; Ka-Se Lam, a Chinese visiting scientist; Patrick Stoller, an American-born graduate student; French scientist Valerie Thouret; American-born undergraduate student Christopher Chay Casso; and English scientist Matthew Evans. Under Newell's tutelage, Zhong-Xiang Wu and Yuanlong Hu both received their Ph.D. degrees.

During the 1990s, Zhu had two notable incidents involving his colleagues. In June 1999, Zhu loudly and publicly chastised Newell's student, Christopher Chay Casso. Newell informed Zhu that this display had upset the student and that such behavior was inappropriate. Newell threatened to fire Zhu at this time, and Zhu subsequently complained to a Personnel Officer in the EAPS Department about Newell's threat, although it appears no action was taken with regard to Zhu's complaint At a conference which Zhu attended on behalf of MIT, Zhu gave a presentation at Newell's request. Following the presentation, a scientist in the audience asked Zhu a question about the presentation; Zhu made a verbal response, slammed his microphone down on the table,

and left the speaking area. After this incident, Newell no longer invited Zhu to attend conferences on behalf of MIT.

Newell traditionally held weekly lunch meetings with his research team, and also routinely hosted sending-off parties for anyone who worked for Newell who was leaving the team. Zhu admits that he initially attended the weekly meetings and that Newell's other Chinese-born researchers attended these meetings as well. Zhu contends that beginning in late 1999, Newell failed to invite Zhu and the other Chinese researchers to these weekly lunch meetings. Newell does not dispute that he no longer invited Zhu, but that he did so because of increasing tension between Zhu and other members of the research team. MIT offers the affidavits of numerous members of the research team who attest to the increased friction. Other Chinese researchers from Newell's team also attest that Zhu is mistaken and that Newell did continue to invite them to the weekly lunch meetings. Newell does not dispute that he failed to hold a going-away party for Zhu, but again attests that he did so because of the tension in the group and the acrimonious circumstances under which Zhu was leaving.

Zhu argues that between 1995 and 2001, Chinese researchers were not allowed to park in the garage nearest their work area, but that Cho and other non-Chinese employees were allowed to park there. Again, the other Chinese researchers dispute Zhu's claims. Zhu complained of the parking policies, and was called a trouble-maker by an unidentified

professor.

Newell was the sole administrator of the NASA grants for his projects. Zhu was at no time involved with drafting proposals or disbursing grant funds for the NASA projects. The rules regarding NASA funding was such that funds were not given directly to any individual, and also could not be stockpiled. In November2000, NASA unexpectedly announced that it would not fund the third and final year for one of Newell's research grant on which Zhu had been working. Newell and MIT had been expecting to receive over $200,000 from NASA for the project for that year.

Subsequent to that, in March 2001, Newell suffered a stroke while working overseas on a NASA project. Newell was unable to return to work for some time while he was recovering; when Newell did return to MIT, it was in a limited capacity. Consequently, Newell's ability to apply for NASA funding was also limited. In May 2001, two of Newell's additional grant proposals were rejected by NASA, and in September 2001, Newell's administrative assistant informed him that he would not have enough funding to continue to support his research projects at the current levels. At that time, Newell was working on two remaining research projects and had only two employees doing research for him: Zhu and Cho. Newell was unable, due to funding shortfalls, to retain both Zhu and Cho.

Cho had been awarded his B.S. and M.S. degrees in electrical engineering from Stanford University, and his Ph.D. in electrical engineering from Cornell

University. Cho then worked as a staff scientist for four years at Arecibo Observatory, National Atronomy and Ionosphere Center in Puerto Rico. Zhu had been awarded only his B.S. degree from Nanjing Meteorological Institute in China and no further degrees, although Zhu did teach meteorology at the Civil Flying Professional Institute of China; was a visiting scholar at Reading University in England; worked on his Ph.D. for five years at the University of Edinburgh; and produced several publications. Cho and Zhu had both worked on Newell's projects for several years, although Zhu had been involved with Newell's projects longer. Cho wrote several papers which were published, including some in the area of Newell's research. In total, Cho published thirty-one papers in highly regarded journals and was lead author on fifteen of those papers. Zhu had published sixteen papers in highly regarded journals, and was first author on four. Zhu had published seventeen additional papers in Chinese journals under another name. Cho taught graduate and undergraduate courses for Newell's students and took over one of Newell's classes while Newell was recovering from his stroke. Zhu was not involved with teaching at MIT.

Newell decided that Cho was more qualified to continue working on Newell's projects and that Zhu would be laid off. Newell broached the idea to his supervisor, who then asked the EAPS Personnel Administrator, Michael Richard ("Richard") to effectuate the layoff. Richard provided Zhu with fourteen weeks' layoff notice, and Zhu's layoff was

subsequently extended by one week. Richard also confirmed with the EAPS Financial Administrator that the lack of adequate grant funds for Newell's research projects was a legitimate financial basis for Zhu's layoff. Richard consulted with a Human Resources Officer at MIT, who approved Zhu's layoff. Richard then discussed Zhu's layoff with the Assistant to the Dean for Personnel for MIT's School of Science, who approved the layoff. Richard sent Zhu a letter dated July 9, 2001, informing Zhu that decline in research funding was forcing MIT to lay Zhu off effective October 16, 2001. The letter also contained the name of a Human Resources Officer and a Department Administrator with whom Zhu could speak if he had further questions; Zhu did not approach either of these individuals, nor did he complain to anyone else at MIT about his dismissal.

Newell's supervisor met with Zhu following the notice to Zhu of his layoff, and offered that MIT would provide financial and other assistance to Zhu, including letters of reference, to assist Zhu in looking for a new job. Zhu did not ask for this assistance until October 12, 2001. Newell wrote a letter of reference for Zhu dated October 17, 2001. Zhu contends that the letter was too short and uninformative to be of any use in finding a new position.

Zhu's final day of employment at MIT was October 23, 2001. Zhu was found cleaning out his office on the following day, and Newell asked Zhu to leave. Yuanlong Hu and Cho heard shouting and believed that there was a disturbance. Yuanlong Hu in fact believed that Newell was in danger an

altercation ensued and Newell fled the area. MIT campus police were summoned and after interviewing witnesses, informed Zhu that he needed to leave. After Zhu packed the remainder of his things, the MIT campus police escorted him from the building. Newell feared that his health had been jeopardized by the incident, and other members of his team were concerned. In response to these concerns, Newell's supervisor barred Zhu from having access to the MIT campus. Zhu then complained that he was unable to access his email account through MIT"; Zhu's email account was reinstated within days of his complaint.

Following Zhu's departure from MIT, Newell was still employing Cho and had Yuanlong Hu working as an unpaid student, Cho began. to seek other employment in June 2001, due to the precarious funding situation, and transferred to a different department at MIT less than six months after Zhu's departure. YuanlongHu, after completing his Ph.D. and after Newell's death, continued working on Newell's research. Yuanlong Hu left MIT in December 2003 to accept a position as a Postdoctoral Fellow at the Georgia Institute of Technology.

On December 18, 2001, Zhu filed a complaint against MIT with the Massachusetts Commission Against Discrimination ("MCAD"), alleging employment discrimination and wrongful termination. In November 2002, MCAD issued a determination of Lack of Probable Cause and dismissed the complaint, which finding was affirmed on MCAD appeal. Newell gave sworn statements for the MCAD investigation prior to his death. Zhu

subsequently filed the instant lawsuit on January 5, 2004, alleging a single count of employment discrimination in violation of G.L.c.151B. Zhu claims that Newell treated him differently and unfairly because Zhu is Chinese, and that Newell fired Zhu because Zhu is Chinese. Zhu further alleges that Newell mis-spent NASA funds intentionally on non-Chinese scientists to refrain from using the funds to pay Zhu or other Chinese scientists. Zhong-Xiang Wu, Wenjie Hu, and Yuanlong Hu, all of whom were Chinese researchers working with Newell, attest that they were never treated differently or unfairly by Newell.

Zhu claims that Newell said to Zhu that Newell could not understand Chinese students and did not want to have more Chinese working for him; that Newell did not know what to say for a reference letter that Wenjie Hu requested Newell write; and that Newell had asked Zhu not to refer in Zhu's papers to papers previously published in Chinese journals. Despite these allegations, Zhu did not complain to anyone at MIT about Newell or Zhu's working conditions, with two exceptions: Zhu did complain about the parking policy, and Zhu complained when Newell threatened to fire him after the incident with an undergraduate student.

MIT filed its Motion for Summary Judgment on December 1,2005. Included in this filing was Zhu's Opposition to MIT's Motion, with a lengthy affidavit made by Zhu in October 2005. MIT included in its summary judgment filing a Motion to Strike Zhu's affidavit, and Zhu's Opposition to that Motion. This

Court (Houston, J.) allowed MIT's Motion to Strike and consequently is disregarding portions of that affidavit for purposes of this Motion.[1] This Court conducted a nonevidentiary hearing on MIT's Motion to Dismiss on February 9, 2006.

DISCUSSION

I. Standard of Review.

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Comm'r of Corr., 390 Mass. 419,422. (1983); Cmty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17(1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial Flesner v Technical Communications Corp, 410 Mass 805,809 (1991), Kourouvacilis v Gen. Motors Corp., 410 Mass

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[1] For a thorough discussion of what portions of Zhu's affidavit have been stricken and the reasons therefore, please refer to this Court's Memorandum of Decision and Order on Defendant's Motion to Strike Affidavit of Plaintiff Yong Zhu, Entered March 30, 2006.

706,716(1991) The Court is required to view the evidence in a light most favorable to the non-moving party. Foley v. Matulewitz, 17 Mass. App. Ct. 1004, 1005 (1984).

In employment discrimination claims involving disparate treatment, summary judgment is disfavored "because the question of the employer's state of mind (discriminatory motive) is 'elusive and rarely is established by other than circumstantial evidence'" Sullivan v. Liberty Mut.Ins.Co., 444 Mass. 34,38 (2005) (quoting Blare v. Husky Injection Molding Sys., 419 Mass. 437,439 (1995)). Although summary judgment is generally not an appropriate means of resolving employment discrimination cases, summary judgment will be granted in favor of the defendant employer where "the plaintiff is unable to offer admissible evidence of the defendant's discriminatory intent, motive, or state of mind sufficient to carry the plaintiff's burdens and support a judgment in the plaintiffs favor." Id. at 39.

II. Analysis.

In order to prevail in an employment discrimination action, a plaintiff must prove membership in a protected class, harm, discriminatory animus and causation. Id.; Lipchitz v Raytheon Co., 434 Mass. 493, 502(2001). Oftentimes, there is no direct evidence of discriminatory animus or causation, and the plaintiff may then rely upon indirect or circumstantial evidence to prove these elements. Sullivan, 444 Mass. at 39. In these cases, Massachusetts courts follow a three-stage burden

shifting test first set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973). See also Wheelock Coil. v. Mass. Comm'n Against Discrimination, 371 Mass. 130, 134-136 (1976).

In the first stage, the plaintiff has the burden of coming forward with evidence to make out a prima facie case of employment discrimination. Abramian v. President & Fellows of Harvard Coll., 432 Mass. 107, 116 (2000). The burden then shifts to the employer to rebut the presumption of discrimination by "articulating a lawful reason or reasons for its employment decision and producing credible evidence to show that the reason or reasons advanced were the real reasons." Sullivan, 444 Mass. at 50 (quoting Abramian, 432 Mass. at 116). If the employer is able to meet its burden, the presumption disappears and the plaintiff must then demonstrate that the reasons advanced by the employer are pretext for discrimination. Id. at 54-55.

(a) Prima Facie Case of Discrimination.

In the instant case, Zhu bears the burden of "establishing by the preponderance of the evidence a prima facie case of discrimination." Id. at 40. His burden is not an onerous one, and is intended to be a "small showing" that is "easily made[.]" Id. at 45 (quoting Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 38 (lst Cir 2003)). In Sullivan, the Supreme Judicial Court held that in cases that involve a reduction in workforce, such as this one, the plaintiff may establish a prima facie case by producing evidence

that he is a member of a protected class, that he performed his job in an acceptable manner, that he was terminated, and that his termination occurred in circumstances that raise an inference of unlawful discrimination. Id.

First, Zhu is clearly a member of a protected class, as he is a Chinese national who was terminated while a naturalized United States citizen, Cho, was retained. Second, Zhu generally performed his job at an acceptable level — during his tenure at MIT, he co-authored numerous articles, participated in NASA missions, and attended academic conferences as a representative of MIT. However, despite his generally acceptable performance levels, Zhu was involved in several confrontational incidents with students and colleagues during his time at MIT.

Third, Zhu must show that his termination took place in circumstances that raise a reasonable inference of impermissible discrimination, This factor is more difficult for Zhu to prove, since Cho, who is a United States citizen of Japanese origin, holds a Ph.D. from an esteemed university, while Zhu never earned his doctoral degree. Cho had also published more articles as the lead author in respected journals than Zhu had, and had concentrated his research on areas relevant to Newell's own research projects. It is difficult to infer discrimination from these circumstances, as Cho is, in many material respects, more qualified than Zhu. However, given the persistent pattern of discrimination against Chinese nationals that Zhu alleges, and in light of the "small showing" required to establish a prima facie case of

employment discrimination, the Court will assume for the moment that Zhu has met his initial burden.

(b) Defendants' Reasons for Termination.

Once the plaintiff has made out a prima facie case of employment discrimination, the burden shifts to the defendant to articulate a legitimate, non-discriminatory mason for the employment decision. MIT "need not prove that the reasons were non-discriminatory," as its burden in the second stage of the McDonnell-Douglas framework is one of production and not persuasion. Id. (quoting Abramian, 432 Mass. at 116). Although MIT's burden is one of production rather than persuasion, MIT "nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful." Id. (quoting Texas Dep't Of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

Here, MIT clearly meets its burden. The legitimate reason it offers for Zhu's discharge is a lack of funding from research grants following Newell's stroke. It is undisputed that Newell lacked funds to pay both Zhu and Cho, that Newell was unable to apply for additional research grants due to his failing health, and that he chose to terminate Zhu and retain Cho. The justification for this choice is obvious and well supported— as noted above, Cho's academic credentials were superior to Zhu's. In addition, Zhu had been involved in a confrontation with a student and had behaved inappropriately at an academic conference. Zhus, MIT's proffered justification for its employment decision is persuasive

and credible.

(c) Defendant's Reasons as Pretexts for Discrimination.

Because MIT has articulated legitimate, non-discriminatory reasons for its decision to terminate Zhu's employment, the burden shifts back to Zhu to show that those reasons are mere pretexts to disguise discrimination. Id. at 55 (citing Lewis v Boston 321 F 3d 207, 214 (1st Cir 2003)). One way that Zhu may meet this burden is to show that the reasons articulated by MIT for the employment decision are not true. Id. (quoting Abramian, 432 Mass. at 117).

Zhu is clearly unable to carry his burden at this stage, as he fails to offer any credible evidence that MIT's proffered reasons for his termination are pretextual and that he was actually fired because he is a Chinese national. Zhu does not dispute that Newell lacked funding to retain both Zhu and Cho, and makes only a weak attempt to claim that he and Cho were equally qualified to continue Newell's research. Instead, his pretext argument centers on Newell's use of research funds in 1999 and 2000 to pay two European scientists to work on the same research projects as Zhu. According to his theory, Newell purposefully depleted research funds in 1999 and 2000 in order to justify Zhu's termination in 2001. However, this argument fails on its face. It is absolutely uncontroverted that Newell could not "stockpile" research funds and carry them over from one year to the next. Therefore, the fact that Newell

paid non-Chinese scientists with research funds in 1999 and 2000 is unrelated to the lack of funding with which to pay Zhu in 2001.

Zhu offers no other admissible evidence that MIT actually terminated him because he is Chinese; rather, he offers an extensive list of various complaints about working conditions, none of which establish that MIT's proffered reasons for his termination are pretextual. In addition, despite Zhu's assertions to the contrary, the other Chinese scientists who worked with Newell have stated that in their experience, he harbored no animus towards Chinese nationals and that, in fact, he helped them to advance their careers.

Zhu is unable, as a matter of law, to show that MIT acted with discriminatory intent, motive, or animus in terminating him and retaining Cho or that any such animus was "a material and important ingredient in the discharge." Id. at 57. For this reason, and because there are no outstanding issues of material fact, summary judgment must issue in favor of MIT.

ORDER

For the foregoing reasons, the defendant MIT's Motion for Summary judgment is ALLOWED.

Julian T. Houston
Justice of the Superior Court

DATED: March 31, 2006

APPENDIX II

Commonwealth of Massachusetts
County of Middlesex
Superior Court
CIVIL DOCKET# MICV2004-00027

Young Zhu
Plaintiff(s)

vs.

Massachusetts Institute Of Technology
Defendant(s)

SUMMARY JUDGMENT M.R.C.P.56

This action came on to be heard before the Court, Julian 1. Houston, Justice, presiding, upon motion of the defendant(s), Massachusetts Institute Of Technology, for Summary Judgment pursuant to Mass R Civ P. 56 -the parties having been heard- and the Court having considered the pleadings- depositions-answers to interrogatories- admissions- and affidavits, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law,

It is ORDERED and ADJUDGED:

That the Complaint of the Plaintiff (s), Young Zhu be and hereby is DISMISSED against the Defendant (s), Massachusetts institute Of Technology, with costs. Dated at Cambridge, Massachusetts this 5th day of April, 2006

.....
Assistant Clerk

Entered: *04/05/2006*
copies mailed *04/05/2006*

APPENDIX III

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

06-P-1214

YONG ZHU

vs.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After the plaintiff (Zhu) was laid off by the defendant (MIT) from his position as a research scientist for cited and explained budgetary reasons, he brought a complaint in Superior Court against MIT in which he alleged discrimination based on his national origin. See G. L. c. 151B, § 4. A judge allowed MIT's motions to strike Zhu's affidavit and for summary judgment, explaining in written memoranda his reasons for his rulings. (A I:205-213 & 214-226) Although Zhu challenges these rulings on appeal, we conclude that there is nothing in his brief or his oral argument before us that warrants any discussion beyond stating that for the reasons set out in the judge's memoranda, we see no error in either of the judge's rulings

Judgment affirmed.

By the Court (Perretta, Dreben & Graham JJ),

Assistant Clerk

Entered: September 25, 2007.

APPENDIX IV

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Young Zhu
175 Linden Ave, #1
Maiden, MA 02148

RE: Docket No. FAR-16538

YONG ZHU
vs.
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

Middlesex Superior Court No. MICV2004-00027
A.C. No. 2006-P-1214

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 11/29/07, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: November 29, 2007

To: Young Zhu
Sandra Sue McQuay, Esquire

APPENDIX V

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square Suite 1400 Boston
Massachusetts 02108 1724
Telephone 61 7-557-1020, Fax 617-557-1145

TO: Young Zhu
175 Linden Aye, #1
Maiden, MA 02148

RE: No. FAR-16538

YONG ZHU
vs.
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

NOTICE OF DOCKET ENTRY

Please take note that on January 31, 2008, the following entry was made on the docket of the above-referenced case:

DENIAL of petition to reconsider denial of FAR application.

Susan Mellen, Clerk

Dated January 31, 2008

To: Young Zhu
Sandra Sue McQuay Esquire

APPENDIX VI

Federal Demonstration Partnership (FDP) General Terms and Conditions
Phase III
1 July 1996

Article	Subject
1.	Recipient Responsibilities and Federal Requirements
2.	Allowable Costs and Prior Approvals
3.	Programs of Related Projects
4.	Payment.
5.	Significant Project Changes
6.	Non-Competitive or Continuation Award Requirements
7.	Financial Reports
8.	Final Report Requirements
9.	Dissemination of Project Results
10.	Acknowledgment of Support and Disclaimer
11.	Data Collection
12.	Site Visits
13.	Pre-award Costs
14.	Extensions Without Additional Funds
15.	Equipment and Real Property
16.	Alteration and Renovation
17.	Use Of U.S.-Flag Air Carriers
18.	Financial Management System
19.	Procurement System
20.	Program Income
21.	Unobligated Balances and Limit of Federal Liability

22. Patents and Inventions
23. Audits and Records
24. Termination and Enforcement
25. National Security
26. Nondiscrimination
28. Research Involving Recombinant DNA Molecules
29. Clean Air and Water
30. Human Subjects
31. Activities Abroad
32. Debarred or Suspended Parties
33. Closeout
34. Rights In Data

1. Recipient Responsibilities and Federal Requirements

a. The recipient institution (recipient) has full responsibility for the conduct of the project or activity supported by this award, in accordance with the requirements of this award, and for the results. The requirements of this award are contained in:

(1) The Federal statute that authorized this award;

(2) These general terms and conditions;

(3) The supplemental agency-specific requirements of the awarding agency that are incorporated in the Demonstration Agreement (hereafter referred to as agency-specific requirements); and

(4) Any special conditions attached to this award.

b. If the requirements of this award conflict, the following order of precedence shall apply:

(1) The Federal statute that authorized this award;

(2) Any special conditions attached to this award;

(3) The agency-specific requirements; and

(4) These general terms and conditions.

c. The requirements of this award identified in subparagraph a of this Article are the entire body of requirements of this award. Codified Federal Regulations, OMB Circulars, such as A-21 and A-110, and other uncodified Federal policy or procedural requirements apply to this award only as specified in these general terms and conditions, the agency specific requirements, or a special condition of this award.

d. Any request by the recipient for waiver or deviation from any provision of either these general terms and conditions or the agency specific requirements shall be submitted to the awarding agency's designated representative identified on the signature page of the Demonstration Agreement. Any request by the recipient for a waiver or deviation from any special condition attached to this award shall be submitted to the cognizant awarding agency official for this particular award (usually the Grants Officer or Contracting Officer who signed the award on behalf of the awarding agency).

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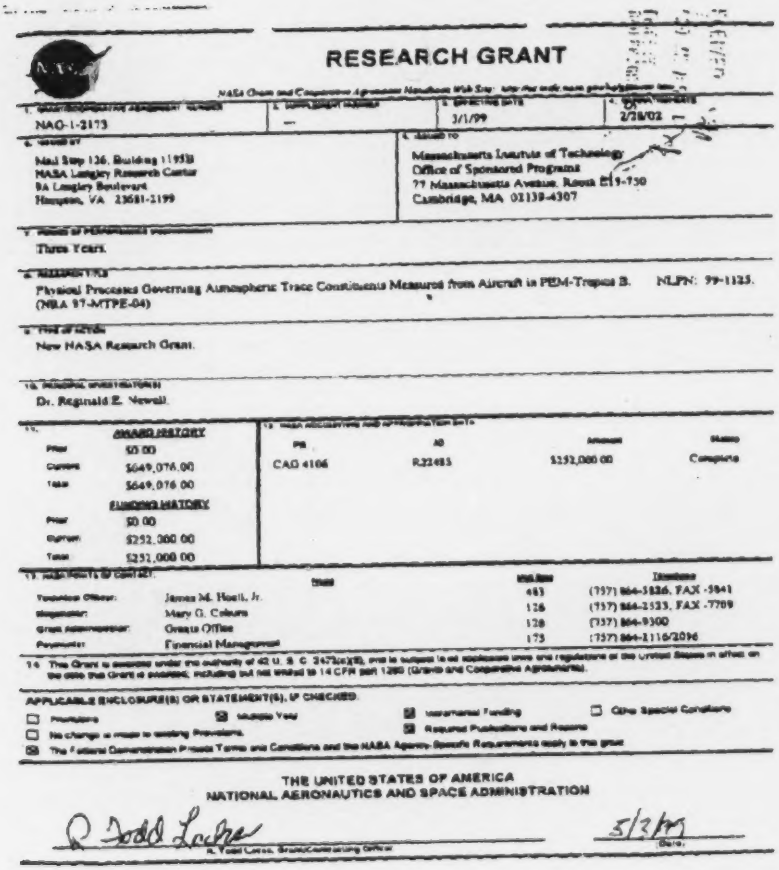
Best Available Copy

APPENDIX VII

COVER PAGE OF NASA RESEARCH GRANT

NAG-1-2173



RESEARCH GRANT

1. Grant/Cooperative Agreement Number	2. Supplement Number	3. Effective Date	4. Expiration Date
NAG-1-2173	--	3/1/99	2/28/02

5. Issued By:
Mail Stop 126, Building 1193B
NASA Langley Research Center
8A Langley Boulevard
Hampton, VA 23681-2199

6. Issued To:
Massachusetts Institute of Technology
Office of Sponsored Programs
77 Massachusetts Avenue, Room E19-750
Cambridge, MA 02139-4307

7. Period of Performance:
Three Years.

8. Title:
Physical Processes Governing Atmospheric Trace Constituents Measured from Aircraft in PEM-Tropics B. NLFN: 99-1123.
(NRA 97-MTPE-04)

9. Type of Action:
New NASA Research Grant.

10. Principal Investigator:
Dr. Reginald E. Newell.

11.

AWARD HISTORY	
Prior	$0.00
Current	$649,076.00
Total	$649,076.00
FUNDING HISTORY	
Prior	$0.00
Current	$252,000.00
Total	$252,000.00

12. NASA Accounting and Appropriation Data

PR	AO	Amount	Status
CAD 4106	R22483	$252,000.00	Complete

13. NASA Points of Contact:

	Name	Mail Stop	Telephone
Technical Officer:	James M. Hoell, Jr.	483	(757) 864-5836, FAX -5841
Negotiator:	Mary G. Coburn	126	(757) 864-2523, FAX -7709
Grant Administrator:	Grants Office	126	(757) 864-9300
Payment:	Financial Management	175	(757) 864-2116/2096

14. This Grant is awarded under the authority of 42 U. S. C. 2473(c)(5), and is subject to all applicable laws and regulations of the United States in effect on the date this Grant is awarded, including but not limited to 14 CFR part 1260 (Grants and Cooperative Agreements).

APPLICABLE ENCLOSURE(S) OR STATEMENT(S), IF CHECKED:

- ☐ Provisions
- ☒ Mandatory Year
- ☒ Intergovernmental Funding
- ☐ Other Special Conditions
- ☐ No change in wage to existing Provisions.
- ☒ Required Publications and Reports
- ☒ The Federal Demonstration Partner Terms and Conditions and the NASA Agency-Specific Requirements apply to this grant.

THE UNITED STATES OF AMERICA
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Q Todd Locke — 5/3/99
(Date)
R. Todd Locke, Grant/Contracting Officer

326